

BEFORE THE KANSAS WORKERS COMPENSATION APPEALS BOARD

AARON GONZALEZ)	
Claimant)	
V.)	
)	CS-00-0447-886
PALMER MANUFACTURING TANK)	AP-00-0451-131
Respondent)	
AND)	
)	
TRAVELERS INDEMNITY CO. OF CT)	
Insurance Carrier)	

ORDER

Claimant requests review of the May 21, 2020, preliminary hearing Order entered by Administrative Law Judge (ALJ) Pamela J. Fuller.

APPEARANCES

Stanley R. Ausemus appeared for Claimant. William L. Townsley, III appeared for Respondent and its insurance carrier.

RECORD AND STIPULATIONS

The Board adopted the same stipulations and considered the same record as the ALJ, consisting of the transcript of Preliminary Hearing from May 19, 2020, with exhibits attached; Evidentiary Deposition of Emily Clouse from May 14, 2020, with exhibits attached and the documents of record filed with the Division.

ISSUE

Claimant appeals arguing he provided timely notice of the March 23, 2019, work-related accident to his supervisor and to the human resources representative on March 25, 2019, and he is entitled to medical treatment.

Respondent argues the ALJ's Order should be affirmed, as Claimant was beyond the statutory time limit when he provided notice of his injury to Human Resources (HR).

The issue is whether Claimant provided timely notice of injury.

FINDINGS OF FACT

The ALJ found Claimant failed to give timely notice of his injury, as required by K.S.A. 44-520(a)(1), and denied the request for medical treatment

Claimant worked for Respondent as a materials handler. On Saturday, March 23, 2019, Claimant was lifting parts weighing approximately sixty pounds off a golf cart. As Claimant was lifting the last part, he felt a pop in his back with sharp and burning pain in his lower back. Claimant believes he told a co-worker, Kevin, he hurt his back.

Claimant completed his shift. He thought his back would improve with rest. On Monday March 25, 2019, Claimant's back was painful. He reported to work as scheduled, and he testified he told his supervisor, Albert Cruz, that he hurt his back on Saturday lifting parts. Mr. Cruz told Claimant he had to report the incident to HR.

On March 25, 2019, Claimant went to HR and talked to Emily Clouse, the HR Director. According to Claimant, he told Ms. Clouse the same thing he told Mr. Cruz. Claimant reported he was in a lot of pain, needed to see a doctor and could not work. He was not given any paperwork to complete, nor was he instructed to see a specific doctor.

Claimant went home and scheduled an appointment with his personal physician, Dr. Abell. Claimant saw Dr. Abell for the first time on March 27, 2019. He told her he had back pain from a 1995 car accident. Since the car accident, Claimant had intermittent back pain and physical therapy at least once a year to treat the back pain. Dr. Abell prescribed medication and restricted Claimant to no lifting over five pounds.

On March 28, 2019, Claimant told Ms. Clouse about the five pound lifting restriction. She told Claimant Respondent can accommodate the restrictions. Claimant told her he would return to work on April 1. She instructed Claimant to provide a doctor's note, which was done. Claimant worked in an accommodated position for three days but was unable to continue due to back pain.

Claimant went to HR and was given an application for short-term disability benefits. Ms. Clouse completed the employer's portion of the application. Claimant was given the application to complete his portion and to give to his doctor to complete the medical provider's section. The application was filed and Claimant received \$3,413.16 in short-term disability benefits.

According to Claimant, he believed he filed a workers compensation claim when he filed for short-term disability. In the section of the short-term disability application completed by Claimant, he stated his disability was due to "accident/injury occurring on October 14, 1995." The details of the accident are: "I was driving on Mary Street, green light on my side at Mary St. & 8th. Intersection, other driver turned left on red light, when accident happened." Claimant was asked to describe what prevents him from performing the duties

of your job. Claimant responded by stating “Periodically lifting of light material causing irritant of sharp lower back pain and inflammation.”¹

In May 2019, Claimant stopped receiving short-term disability benefits, because it was determined by the short-term disability carrier Claimant’s back condition was work-related. Claimant was asked to come to HR on May 28, 2019. Claimant met with Ms. Clouse and the safety director. He told them he wanted to file a worker’s compensation claim. Claimant reported his work injury occurred on March 23, 2019. Claimant was questioned as to why he was reporting a work injury now. Claimant responded by stating the short-term disability benefits had stopped.

According to Ms. Clouse, Claimant did not say anything about a work-related injury until May 28, 2019. Ms. Clouse has several years of experience handling employment issues including workers compensation issues. According to Ms. Clouse, she confirmed with Claimant on March 25, 2019, if Claimant’s back pain was work-related and Claimant told her it was not, it was due to an old injury. Mr. Cruz denies Claimant told him he had hurt his back at work on March 23, 2019, Ms. Clouse also contacted Mr. Cruz on March 25, 2019, and asked if Claimant’s back complaints were work-related. Mr. Cruz told her no, it was an old injury.

In a letter dated August 1, 2019, Dr. Abell, stated Claimant presented on March 27, 2019, for evaluation of a back injury while working for Respondent on March 23, 2019. It was noted there was a history of back problems. Dr. Abell, stated in this letter, “Initially, he declined to involve worker’s compensation, so some treatments were delayed because he was not able to afford them.”²

PRINCIPLES OF LAW AND ANALYSIS

K.S.A. 2019 Supp. 44-520 states:

(a)(1) Proceedings for compensation under the workers compensation act shall not be maintainable unless notice of injury by accident or repetitive trauma is given to the employer by the earliest of the following dates:

(A) 20 calendar days from the date of accident or the date of injury by repetitive trauma;

(B) if the employee is working for the employer against whom benefits are being sought and such employee seeks medical treatment for any injury by accident or repetitive trauma, 20 calendar days from the date such medical treatment is sought; or

¹ P.H. Trans., Cl. Ex. 3.

² Clouse Depo., Resp. Ex. 1.

(C) if the employee no longer works for the employer against whom benefits are being sought, 20 calendar days after the employee's last day of actual work for the employer.

Notice may be given orally or in writing.

(2) Where notice is provided orally, if the employer has designated an individual or department to whom notice must be given and such designation has been communicated in writing to the employee, notice to any other individual or department shall be insufficient under this section. If the employer has not designated an individual or department to whom notice must be given, notice must be provided to a supervisor or manager.

(3) Where notice is provided in writing, notice must be sent to a supervisor or manager at the employee's principal location of employment. The burden shall be on the employee to prove that such notice was actually received by the employer.

(4) The notice, whether provided orally or in writing, shall include the time, date, place, person injured and particulars of such injury. It must be apparent from the content of the notice that the employee is claiming benefits under the workers compensation act or has suffered a work-related injury.

(b) The notice required by subsection (a) shall be waived if the employee proves that (1) the employer or the employer's duly authorized agent had actual knowledge of the injury; (2) the employer or the employer's duly authorized agent was unavailable to receive such notice within the applicable period as provided in paragraph (1) of subsection (a); or (3) the employee was physically unable to give such notice.

(c) For the purposes of calculating the notice period proscribed in subsection (a), weekends shall be included.

Claimant contends he gave notice to his employer of his March 23, 2019, work-related injury on March 25, 2019. However, the evidence does not support this contention.

Claimant believes he filed a workers compensation claim when he completed the short-term disability application. If that was Claimant's belief it is reasonable to state on that application what happened on March 23, 2019. Instead, Claimant describes his car accident in 1995 where he injured his back and sometimes lifting at work irritates his back condition. Claimant's doctor also talks about Claimant's reluctance to involve workers compensation and it has resulted in delay in Claimant receiving all the treatment he needed. Claimant overcame his reluctance to involve workers compensation when his short-term disability stopped.

The employer's evidence that Claimant did not provide notice of his accident until May 28, 2019, is credible. The HR Director has experience with workers compensation

claims and work-related accidents. The HR Director's testimony was corroborated by Mr. Cruz, Claimant's supervisor.

Claimant could have had accidental injury on March 23, 2019. However, Claimant did not provide any notice to his employer about his back complaints being work-related until May 28, 2019, over a month after the 20 day notice period had expired. Claimant's request for medical treatment is denied. Claimant did not provide timely notice of his work-related accident.

By statute, the above preliminary hearing findings and conclusions are neither final nor binding as they may be modified upon a full hearing of the claim.³ Moreover, this review of a preliminary hearing Order was determined by only one Board Member, as permitted by K.S.A. 2019 Supp. 44-551(I)(2)(A), unlike appeals of final orders, which are considered by all five members of the Board.

CONCLUSIONS

After reviewing the record compiled to date, the undersigned Board Member concludes the preliminary hearing Order should be affirmed.

DECISION

WHEREFORE, it is the finding, decision and order of the undersigned Board Member that the Order of Administrative Law Judge Pamela J. Fuller dated May 21, 2020, is affirmed.

IT IS SO ORDERED.

Dated this _____ day of August, 2020.

HONORABLE REBECCA SANDERS
BOARD MEMBER

c: Via OSCAR

Stanley R. Ausemus, Attorney for Claimant
William L. Townsley, III, Attorney for Respondent and its Insurance Carrier
Hon. Pamela J. Fuller, Administrative Law Judge

³ K.S.A. 2019 Supp. 44-534a.